

1 UNITED STATES DISTRICT COURT
2 WESTERN DISTRICT OF WASHINGTON AT SEATTLE

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4 STATE OF WASHINGTON, et al.,) C18-1115-RSL
5)
6 Plaintiffs,) SEATTLE, WASHINGTON
7)
8 v.) August 21, 2018
9)
10 UNITED STATES DEPARTMENT OF) MOTION HEARING
11 STATE, et al.,)
12)
13 Defendants.)

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15 VERBATIM REPORT OF PROCEEDINGS
16 BEFORE THE HONORABLE ROBERT S. LASNIK
17 UNITED STATES DISTRICT JUDGE
18

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1 THE CLERK: Case C18-1115-L, State of Washington,
2 et al, versus United States Department of State, et al.
3 Counsel, would you please make your appearances.

4 MR. RUPERT: Jeff Rupert, Assistant Attorney General
5 for plaintiff, states.

6 MR. SPRUNG: And Jeff Sprung, Assistant Attorney
7 General.

8 MS. BENESKI: Kristin Beneski, Assistant Attorney
9 General for the State of Washington.

10 MR. JONES: Zach Jones, Assistant Attorney for the
11 State of Washington.

12 MR. KAPLAN: Scott Kaplan, Assistant Attorney General
13 for the State of Oregon.

14 THE COURT: Who is also a member of the bar of the
15 State of Washington.

16 MR. KAPLAN: Yes, Your Honor.

17 THE COURT: Great.

18 MR. MYERS: Good morning, Your Honor, Steven Myers on
19 behalf of the federal defendants.

20 THE COURT: Mr. Myers, are you all alone representing
21 the entire United States of America?

22 MR. MYERS: I am, Your Honor, yes.

23 THE COURT: We appreciate that.

24 MR. ARD: Good morning, Your Honor, Joel Ard for the
25 defendants Second Amendment Foundation, Defense Distributed,

1 and Conn Williamson.

2 MR. GOLDSTEIN: Your Honor, Matthew Goldstein for the
3 private parties Conn Williamson, Defense Distributed and
4 Second Amendment Foundation.

5 THE COURT: Sure.

6 MR. HAMMOND: Dan Hammond for Defense Distributed.

7 MR. FLORES: Your Honor, my name is Chad Flores. I'm
8 representing Defense Distributed. And I will be giving the
9 argument for all of the private defendants.

10 THE COURT: Welcome, Mr. Flores. Thank you.

11 All right. Well, we are here for the follow-up of the
12 temporary restraining order, and arguing today whether the
13 Court should issue a preliminary injunction in this case.
14 And I believe we will start with Mr. Rupert.

15 And there was an indication that, Mr. Sprung, you would
16 address a Second Amendment issue if it came up; is that
17 right?

18 MR. SPRUNG: Yes, Your Honor.

19 THE COURT: Okay. I think I might save that for
20 rebuttal. So thanks for letting me know.

21 So, Mr. Rupert, you have the floor.

22 MR. RUPERT: Thank you, Your Honor.

23 Your Honor, the State Department voluntarily entered into
24 a settlement agreement with an organization run by a crypto
25 anarchist. The State Department has chosen to give access to

1 potentially untraceable and undetectable firearms to any
2 terrorist, felon, or domestic abuser, with a laptop and 3D
3 printer. This Court granted a temporary restraining order,
4 and we're now asking the Court to convert that to a
5 preliminary injunction.

6 We have procedural claims, the 30-day notice to Congress
7 and the Department of Defense concurrence, as well as an
8 arbitrary and capricious claim. The order I was going to
9 address it in, unless Your Honor wanted me to go in a
10 different order, is I was going to address irreparable harm
11 first, since that seems to be the main challenge by the
12 government; then likelihood of success on the merits;
13 standing; and --

14 THE COURT: That's fine.

15 MR. RUPERT: -- then First Amendment.

16 THE COURT: Um-hum.

17 MR. RUPERT: As far as irreparable harm, the
18 government's chief contention is that the harms that the
19 states have identified in their many declarations cannot be
20 traced to the government's actions. I think that's
21 thoroughly rebutted by the evidence in the record; in fact,
22 by the government's own prior filings in the Texas
23 litigation.

24 Notably, in the April 2018 brief, the government argued
25 that the Internet does not have separate parts, domestic and

1 foreign, it's all one Internet. So once this information
2 goes online, it's going to be available. And as the Court
3 noted in its prior temporary restraining order decision, the
4 proliferation of these firearms will have many of the
5 negative impacts on the state level that the federal
6 government once feared on an international stage.

7 The Court then quoted a number of the government's own
8 words against them -- or not against them, excuse me, just as
9 illustrative from the briefing. But I'd also highlight the
10 declaration of Lisa Aguirre, or Aguirre, I'm not sure how you
11 pronounce her name. But she talked about the potential for
12 terrorist groups using such weapons against the United
13 states.

14 Well, the states are a part of the United States. So we
15 believe that the government's own evidence demonstrates that
16 the government is well aware that significant harm could
17 occur to the states if its rulings are permitted to stand
18 here.

19 One of the central issues that is the cause for the harm
20 is the widespread use of metal detectors. Now, we've
21 submitted numerous declarations about metal detectors, and
22 how they are used, and how they do not pick up these plastic
23 guns. But I'd highlight the declaration from Mary McCord.
24 She was the Acting Assistant Attorney General for National
25 Security, retiring in May 2017. But she oversaw all federal

1 counterterrorism, espionage, and export control prosecutions,
2 including prosecutions of terrorists.

3 And she details the difficulties that would occur if these
4 guns become prevalent. Because they're just not picked up by
5 metal detectors. And it's well known by the government, it's
6 in Lisa Aguirre's declaration as well. Then there's numerous
7 other declarations that make the same point.

8 But metal detectors, as are in the declarations, are used
9 throughout the United States, in airports, the courthouse --
10 in fact, the courthouse downstairs -- government buildings,
11 prisons, stadiums, even schools. One of the interesting
12 things one of the experts pointed out that I hadn't even
13 thought about, that with 3D printers in schools, if the
14 school has a metal detector, the gun could be printed in the
15 school, even evading it further.

16 Now, this all demonstrates the public-safety concern that
17 the states have raised here, by the government's sweeping
18 change of its position that it had for five years. Now, the
19 states have numerous laws about who is prohibited from owning
20 a gun, such as felons, domestic abusers, those with mental
21 health issues, or for age. And we have background checks
22 that are used to identify those folks.

23 Some states even have limits on the manufacturing of a
24 gun. Massachusetts does, for instance. New Jersey does as
25 well. Well, all of those could easily be evaded, again, with

1 a 3D printer and these files. And then the issue becomes,
2 that I just identified, the metal detectors are not going to
3 be useful at all.

4 Just a few other points I'll highlight on irreparable
5 harm, and then I'll move on. I want to just focus on, for a
6 moment, the deposition of Professor Patel from the University
7 of Washington, who is a MacArthur Genius Fellow. He talks
8 about how 3D printing works now, and that this Liberator gun
9 could easily be printed. But then also discusses the
10 advances that he believes, in his opinion, will occur rapidly
11 in this area, that the technology will proceed far -- be far
12 better than we currently have, as new gun designs come out,
13 and, frankly, the 3D printing advances.

14 I also want to highlight that the 3D guns will spread.
15 And by that I'm referring to the declaration from Ron Hosko.
16 He's a 30-year career FBI agent. He was the Assistant
17 Director of the FBI's Criminal Investigative Division and led
18 the Bureau's largest program worldwide. But his declaration
19 discusses his experiences and his belief that the 3D printers
20 will be embraced by criminal enterprises, if it becomes
21 available.

22 One other thing to highlight, and then I'll kind of go on
23 to a few other points here, is that we do know, from the
24 declaration from Blake Graham, the special agent for the
25 California Department of Justice, that ghost guns, these are

1 the metal guns that don't have any identifier on them, they
2 are emerging more and more in California. They've been used
3 in a number of mass shootings.

4 There's heightened risk of terrorist attacks. And the
5 Aguirre and McCord declarations detail those. Then the
6 ability of law enforcement to use serial numbers to solve
7 crimes would be greatly compromised if these became
8 widespread. And there, I point to the declaration of John
9 Camper from the Colorado Bureau of Investigation, who they
10 did some testing on these guns, and they concluded that
11 standard forensic techniques cannot be applied to link a
12 projectile or bullet to a particular 3D-printed firearm.
13 That's because the barrel is not rifled, and the firing
14 conditions can't be replicated. And, frankly, it was unsafe
15 to fire some of the guns.

16 One of the things we hear in response is, well, the
17 Undetectable Firearms Act, you know, that covers this, so why
18 are you complaining, states? Well, as Mary McCord in her
19 declaration notes that the Undetectable Firearms Act does
20 nothing to deter terrorists or bad actors from making a 3D
21 weapon. In fact, the current system has firearms dealers
22 whose livelihood depends on compliance with federal and state
23 law. But those will be removed if these become widespread.

24 I think Chief Best from the Seattle Police Department
25 summed it up best with if we have 3D guns, you know, such a

1 world will be more dangerous for the public and for the
2 police officers whose job it is to protect the public.

3 So we believe the irreparable harm element has been shown
4 to grant a preliminary injunction. And we note that there is
5 no evidence to the contrary submitted by the government or
6 the other private defendants.

7 Turning now to likelihood of success on the merits. As we
8 discussed last time, I think it's pretty clear the items are
9 on the Munitions List. The government has taken that
10 position for five years starting in 2013, all the way up to
11 April 2018 in court filings.

12 They then took two actions to remove the items from the
13 Munitions List, the temporary modification and the letter.
14 Both require notice, 30 days' notice to Congress. And that's
15 -- the statute that requires that is 22 -- excuse me --
16 2778(f)(1).

17 There's no dispute that the notice to Congress was not
18 given. And that's in the record with the declarations from
19 Representative Engel, as well as the letter from Senator
20 Menendez. The position of the government is, though, that it
21 wasn't required because they believe that the statute, when
22 it refers to items, is actually referring to a category or
23 subcategories of items. We've discussed this in the brief,
24 but we don't believe that finds support in the actual text of
25 the statute or the case law.

1 And they also talk about a *Skidmore* defense. But *Skidmore*
2 doesn't apply if the statute is unambiguous. In support we
3 would highlight the CFR section that we highlighted, as well
4 as the case law, which distinguishes between categories and
5 items. And even the executive order that we have at issue,
6 refers to items or categories of items. And if an item was a
7 category it wouldn't make any sense.

8 So we believe that when these were removed, that notice
9 was required. And there's no dispute it was not given.

10 THE COURT: Mr. Rupert, when we first met, the
11 absence of 30-days notice was particularly acute, because we
12 were acting on virtually no notice whatsoever. Now Congress
13 obviously has, even if they haven't received the official
14 notice, they're on notice. And they will have had about
15 30 days to act. And I think it's fairly obvious they're not
16 going to act. So what is the irreparable harm of not giving
17 the notice?

18 MR. RUPERT: Actually the notice, if you look at the
19 statute provision, it requires the notice shall describe the
20 nature of any controls to be imposed, and that item under any
21 other provision of law. It's just not clear what position
22 the government is taking, if it is going to do anything to
23 protect these weapons, under another mechanism or not. And
24 it is a formal mechanism to Congress that is required to be
25 done. And, again, it's a procedural claim, but it was not

1 done.

2 The other procedural claim that we identify was the
3 concurrence of the Secretary of Defense. And there's a bit
4 of a dispute whether that's reviewable. We believe it is
5 based on the *City of Carmel* case from the Ninth Circuit. The
6 government had cited a district court decision out of the
7 D.C. -- D.C., the *Defender of Wildlife* case, which had some
8 similar language. But I would say the *Defender of Wildlife*
9 case noticeably has a section labeled, "Application and
10 judicial review." That's not in the executive order that we
11 have here. And we believe, therefore, that the *City of*
12 *Carmel* case controls.

13 So as far as the Department of Defense, the declarations
14 submitted by the government trying to explain what did occur,
15 there's no mention in that declaration whatsoever that the
16 Department of Defense concurred in the temporary
17 modification.

18 I will say, though, that that declaration does say that
19 the Department of Defense concurred in the letter. Now,
20 there's no details about the date, time, or person that gave
21 it. But it does say that. And I would note that there's a
22 distinction between the letter and the modification, too.
23 The letter addresses just the specific articles that were at
24 issue. That's the Liberator gun and a few other items. The
25 modification, on the other hand, was much broader, because

1 that covered not only the guns that -- the designs that had
2 been submitted, but as well as any future 3D guns that might
3 be submitted by private defendants or anyone else. So that's
4 the much broader one that there's no concurrence from the
5 Department of Defense.

6 Just to give background here. Removals from the Munitions
7 List rarely occur. And I'm referring to the declaration from
8 Representative Engel's letter as well as Senator Menendez's
9 letter. And they explained the usual process that occurs
10 where, well, 30 days is what is required statutorily. Often
11 it's far greater than that. And the Department of Defense is
12 involved in this whole process. And that just wasn't done
13 here.

14 I want to move to the arbitrary and capricious claim. We
15 don't have the record here, and we will need that when we
16 reach the final merits of this, but we believe there is
17 sufficient information before you right now to demonstrate a
18 likelihood of success on the merits. That's because of the
19 following: First, there's a prior CJ determination in 2015,
20 as well as the Aguirre declarations that have findings that
21 these items need to be on the Munitions List for national
22 security reasons. And they also detail the harm that would
23 occur if they were removed.

24 Second, the government in past litigation filings for over
25 three years, said essentially the same thing, discussing the

1 harms and need for national security for these items to
2 remain on the Munitions List. And the third, I would cite
3 the Heidema declaration that the government has submitted in
4 opposition. Now, this declaration details the government's
5 rationale for making its decision.

6 Now, it does, as I mentioned, address the concurrence to
7 the letter by the Department of Defense. But it's notable
8 about what is not in this declaration. This declaration
9 doesn't say there's any justification, rationale or findings
10 for the government's change in position from 2015 in the CJ
11 or the Aguirre declaration until now.

12 The government's declaration does not say there's any
13 national security or public safety, it doesn't even mention
14 at all about putting these guns out there. And there's --
15 the government doesn't say that a new CJ was done. What the
16 government does rely on is proposed rulemaking that it has
17 done to move some items from Category I of the Munitions
18 List, over to the Commerce Department.

19 But this can't be a basis for this decision, at least if
20 it is -- it's an arbitrary and capricious one, because it
21 would be an attempt to make an end run around the rulemaking
22 process. Because these rules are not final. We don't know
23 what will come out of it, in fact. And if they're trying to
24 short-circuit the rulemaking process by using this
25 modification, I think it fails right there as arbitrary and

1 capricious.

2 Then more telling, I would look at the actual rationale
3 that they identify for moving items from the Munitions List
4 over to Commerce. And I'm referring to paragraph 19 of
5 Ms. Heidema's declaration. She refers to the transfer of
6 certain items was informed by the Defense Department's
7 assessment that the items proposed for transfer are already
8 commonly available.

9 We know plastic guns are not commonly available. So if
10 that's the rationale for the government's decision now to
11 make plastic guns available, not even the declaration
12 supports that. And we believe that it's arbitrary and
13 capricious.

14 One of the other items in paragraph 19 that's highlighted
15 is that little national security concern is highlighted by
16 the fact that the Department of Defense does not generally
17 review export license applications for the physical items
18 described in Category I, as the Department does for license
19 applications in other categories. Well, we know that they
20 actually did review this one here, that's the 2015 CJ
21 determination. So, again, this declaration by Ms. Heidema of
22 trying to justify the government's decisions in this case,
23 actually does not justify it at all, and shows the arbitrary
24 nature of it.

25 The final thing -- two other things to highlight. There

1 has been suggestions by the private defendants that the First
2 Amendment was a factor in this analysis. But Ms. Heidema's
3 declaration makes clear that the Department denies and
4 continues to deny that it violated the First or Second
5 Amendment or acted in ultra vires. So that was not the
6 rationale either.

7 And, finally, I'm not quite sure how best to categorize
8 it, because it's so unusual it's hard to find any case law.
9 But we have the President himself tweeting, that this doesn't
10 seem to make much sense. And that's not quite the legal
11 standard, but ultimately that's what is an arbitrary and
12 capricious decision. Does this make sense or not? And we
13 believe that based on Ms. Heidema's declaration, as well as
14 the prior declarations in the 2015 CJ determination that it
15 does not.

16 I was going to move on to standing, unless the Court had
17 any questions about the likelihood of success on the merits.

18 THE COURT: Well, on the Heidema declaration, she's
19 not somebody who was brought in in a new administration or
20 anything like that. It seems like she's been part of the
21 government agencies that have been looking at this for
22 several years. The federal defendants have made the argument
23 that this was a kind of boring bureaucratic look at
24 something, and just happened to cover the 3D guns, but it
25 wasn't set out to change things, in particular to that, it

1 was this 50-caliber or below.

2 What evidence do the states have that this really was a
3 setup to change the 3D guns, rather than a bureaucratic
4 process that could put anyone to sleep?

5 MR. RUPERT: I think the timing is one of the big
6 questions that we have throughout this whole thing, the way
7 it was revealed at certain times, the settlement.

8 Overall, though, regardless of why it was done, what's in
9 that declaration versus what is not, the case law is clear on
10 arbitrary and capriciousness. If you're going to make a
11 significant change, you need to have a rationale for it. It
12 doesn't need to be a better rationale. But you do need to
13 have a rationale. And none is identified in this
14 declaration. Because as I pointed out, this doesn't apply to
15 plastic guns, the rationale that they have, that it's readily
16 available, the guns, because that's just not so for plastic
17 guns.

18 THE COURT: So the action may not be arbitrary and
19 capricious to the larger categories, but its impact on the
20 plastic gun issue is?

21 MR. RUPERT: Correct. That's why we do wonder what
22 will come out in the final rulemaking, which we don't know.
23 But you do wonder, do plastic guns get excepted from the
24 final rulemaking. And then we'll just have to see what they
25 do, and then we'll have to see if there's any challenges to

1 that.

2 THE COURT: Okay. You can move on now, to standing.

3 MR. RUPERT: Sure.

4 As we discussed last time, standing is injury in fact,
5 traceability and redressability. But these requirements are
6 relaxed in the APA case. And the state has standing, if it's
7 either sovereign, quasi-sovereign, or proprietary interest.
8 I want to highlight the *Massachusetts v. EPA* case that talks
9 about the special solicitude in the standing analysis,
10 because that does change it somewhat when the states are
11 involved. And that was applied for the *EPA* case, and also
12 recently applied in the *Texas v. United States* case, that was
13 affirmed by an equally divided court in 2016.

14 This is, I think, pretty well laid out in the briefs, so I
15 was going to move through it somewhat quickly. The states
16 have a sovereign interest to create and enforce the legal
17 code. And we believe that the government's actions under
18 forces our ability to enforce the statutory codes. And we
19 have multiple declarations that support that.

20 It also undermines the maintenance and recognition of
21 borders, because this will allow guns, based on the McCord
22 declaration, to come across the borders by air, sea, and
23 water. Also affects the police power, because it seriously
24 impedes the ability to protect the residents from injury and
25 death. And there's numerous declarations that go into that.

1 On the proprietary standing, the state has submitted
2 declarations related to its jails. Metal detectors are
3 widely used there. And if this technology, that technology
4 being 3D guns, is widely implemented, the metal detectors are
5 going to have a significant hole. And we'll have to buy a
6 whole new wave of technology to scan folks when they come
7 back in, or guests that come in. And we're going to have to
8 do hand searches. So there's going to be significant expense
9 involved.

10 The same with law enforcement, anybody who is relying on
11 metal detectors is going to have to upgrade their technology,
12 if such technology exists, or they're going to have to go to
13 more hand searches, which is going to be more intensive and
14 require more manpower. So we believe that's the proprietary
15 interest right there.

16 As far as quasi-sovereign, we believe there's, again, a
17 threat, similar to the sovereign and proprietary, a threat to
18 safety and physical well-being, to the states' residents by
19 making these weapons more available, which sort of dovetails
20 with what I've discussed about irreparable harm.

21 The next part of a standing analysis is zone of interest
22 and prudential standing. This is not meant to be an
23 especially demanding test. And it's presumptive -- agency
24 actions are presumptively reviewable. When you look at the
25 AECA itself, it's intended to protect domestic security by

1 restricting the flow of military information abroad. But it
2 does so in furtherance of world peace and the security and
3 foreign policy of the United States.

4 As I said before, the states are the United States. If
5 this is going to -- if we're doing it to protect national
6 security, we should be doing it to protect the states. And
7 we have declarations in the record that talk about these guns
8 flowing across our borders, or the potential that somebody in
9 a foreign country could seize an airplane by getting onto the
10 airplane in a foreign country and flying it towards the
11 States.

12 I'm going to move on to the First Amendment issues, unless
13 Your Honor had any questions about standing.

14 We believe the First Amendment is irrelevant to the merits
15 of the case. And we do that because the government, in the
16 Heidema declaration, states that they didn't rely on the
17 First Amendment in deciding these decisions. Now, I do
18 believe the Court should consider the First Amendment when it
19 balances the equities, and that element of the temporary
20 restraining order. We believe it's an easy decision there,
21 though, because Judge Pitman has already done that review,
22 being on a somewhat different standard, but on a preliminary
23 injunction standard, and determined that plaintiffs have not
24 shown a substantial likelihood of success on the merits of
25 their claim under the First Amendment.

1 We have a number of arguments in here, and I'm going to
2 focus on Judge Pitman's analysis. But I do want to highlight
3 some of those arguments before I get to Judge Pitman.

4 First is that 3D guns themselves are not an expressive
5 act. And for that, I'm relying on the *Vartuli* case cited in
6 the briefs. Because the nature of these guns is that you
7 just press a button and it prints. So we don't believe that
8 itself is an expressive act.

9 One of our other arguments that we raise in our briefs is
10 that these load files are integral to criminal conduct and
11 are, therefore, exempt from the First Amendment. And there's
12 some cases that we cite for that. But the gist of that is
13 that with the Undetectable Firearms Act, as well as the state
14 law restrictions, it's illegal to possess a weapon such as a
15 plastic gun. So, therefore, these guns -- excuse me, the
16 files are so tied to those plastic guns, that they themselves
17 have no First Amendment protection.

18 But what I want to focus most on is intermediate scrutiny
19 or whether this is content neutral, as Judge Pitman had
20 determined. Before we get there, though, we need to look at
21 this issue of a prior restraint. Because the private
22 defendants have claimed that if there's a prior restraint,
23 that strict scrutiny automatically applies. Well, that's
24 just not so in the case law.

25 As Judge Pitman cited, the standard review for analyzing

1 prior restraints, there's different standards of review
2 depending on the restraint at issue. While there's a heavy
3 presumption against validity, that's not a standard review in
4 itself. And he cites, for instance, the *Seattle Times* case,
5 where there was a prior restraint, but strict scrutiny was
6 not applied.

7 Following Judge Pitman's analysis, he determined that the
8 law is content neutral. And he did so because the ITAR does
9 not regulate disclosure of technical data, based on the
10 message it's communicating. And that's exactly our position
11 as well. Because the fact that some of these private
12 defendants are in favor of global access to firearms or have
13 some other agenda, is not the basis for regulating the export
14 of the computer files at issue.

15 The motivation of the government, as the government said
16 itself in its brief, is not the product of hostility towards
17 their ideas or the spread of 3D printing technology, but it's
18 the very means to easily do so. So I believe that
19 intermediate scrutiny applies here because it's content
20 neutral.

21 If there is intermediate scrutiny, again, I'm going to
22 follow Judge Pitman's reasoning here. There's a substantial
23 government interest in regulating the dissemination of
24 military information and combatting terrorism. And there's
25 numerous cases on that point. We believe that the

1 regulations here are narrowly tailored, and there's a
2 procedure to challenge it with a CJ. And the declaration
3 from Ms. Aguirre indicated that most CJs are granted. By
4 that, I mean you're allowed to export the item.

5 Finally, there are alternative avenues to produce this
6 information. But here, notably, it only applies to Internet
7 posting. They can hand them around domestically. And also
8 there's a wide exception in the statute for general
9 scientific, mathematical or engineering papers.

10 I would note that Judge Pitman's decision relied on a
11 Ninth Circuit case, which we again believe controls, is the
12 *Chi Mak* case, from the Ninth Circuit in 2012, where the Ninth
13 Circuit quoted -- quote says, it repeatedly rejected First
14 Amendment challenges to the AECA, its implementation of
15 regulations in its predecessor statute.

16 So, again, we believe that decides the issue with the
17 First Amendment. But Your Honor only has to reach these
18 issues on the balancing of the equities test for an
19 injunction.

20 Moving on to the balancing of the equities. We believe
21 there's a real and present danger to the public safety. The
22 President seems to agree. And the preliminary injunction, if
23 it were issued, as with temporary restraining orders, will
24 not harm the government. It would put us back to where we
25 were before this all happened. As to the First Amendment

1 issues that have been raised by the private defendants, I'll
2 just address them there. And they didn't have this ability
3 to publish for five years here. And just continuing it on
4 while this litigation proceeds, we don't believe will cause
5 much harm, when compared with the irreparable harm that the
6 states would suffer, as demonstrated by our declarations.

7 I don't have anything further, unless Your Honor has any
8 questions.

9 THE COURT: I'll catch you in rebuttal.

10 MR. RUPERT: Okay. Thank you.

11 THE COURT: Um-hum. Mr. Myers.

12 MR. MYERS: Thank you, Your Honor. The federal
13 government agrees that undetectable plastic firearms pose a
14 significant risk to domestic public safety. The Department
15 of Justice is fully committed to vigorously enforcing the
16 Undetectable Firearms Act.

17 THE COURT: How do you vigorously enforce an act to
18 find undetectable guns, until that gun ends up being used?
19 How do you proactively stop and find those things?

20 MR. MYERS: Your Honor, federal law enforcement is
21 involved in finding all kinds of illicit contraband;
22 undetectable firearms, unlawful drugs, any number of things.
23 The federal government has a lot of experience doing that.

24 THE COURT: Right. But we don't just wait for the
25 heroin to be produced, and then try to find it. We say it's

1 against the law to produce the heroin.

2 MR. MYERS: Correct, Your Honor.

3 THE COURT: If we have something that, by definition,
4 is undetectable and untraceable, wouldn't it make sense that
5 it should not be manufacturable?

6 MR. MYERS: And to be clear, Your Honor, it is
7 unlawful to produce an undetectable firearm.

8 THE COURT: Right.

9 MR. MYERS: As in other contexts it's unlawful to
10 produce illegal drugs. So that is our point. It is unlawful
11 to produce an undetectable firearm. And it's the
12 Undetectable Firearms Act that is the basis for that
13 illegality. And the government is fully committed to
14 enforcing that statute.

15 It's also fully committed to enforcing other prohibitions
16 on firearms ownership, by people who are ineligible to own
17 firearms: Felons, and those who were judged mentally ill,
18 and others. But the fact that a weapon is dangerous
19 domestically, and there's a basis to regulate it
20 domestically, doesn't mean that it provides a critical
21 military or intelligence advantage, which is the standard
22 that applies when the State Department exercises its
23 authority under the Arms Export Control Act.

24 THE COURT: So are you saying it never should have
25 been there in the first place?

1 MR. MYERS: Your Honor, the key event, from the
2 government's perspective, is the May notices of proposed
3 rulemaking from state and commerce, that reflect the
4 government's judgment that nonautomatic firearms, sub
5 50-caliber, do not present a critical military or
6 intelligence advantage. So, no, I'm not saying it never
7 should have been.

8 THE COURT: But we now have a new proposed
9 modification that will take all those weapons off the table,
10 as far as the Export Control Act goes.

11 MR. MYERS: Correct.

12 THE COURT: And I didn't require production of the
13 record under this tight time schedule, because I didn't want
14 you worrying about that. But at some point the question of
15 whether this was the bureaucracy at work, but not noticing
16 that it affected 3D printed weapons; or, my goodness, let's
17 get these 3D weapons unregulated and this is the way to do
18 it, does become important, doesn't it?

19 MR. MYERS: Your Honor, if this case -- assuming this
20 case proceeds and we're directed to produce the
21 administrative record, everything that is part of the record
22 will be before the Court.

23 THE COURT: Well, do you know the answer to the
24 question? Was it -- did somebody notice that this
25 modification is going to change the 3D gun thing, and it was

1 part of the process; or, we just wanted to change the
2 50-caliber or less, nonautomatic, and we didn't even think
3 about the 3D printing?

4 **MR. MYERS:** Your Honor, I think the face of the
5 documents that we've relied on and put before the Court
6 suggests that there's been a year's long effort to revise the
7 United States Munitions List. And as part of that, the
8 judgment has been made that sub-50-caliber nonautomatic
9 firearms ought not be regulated under the AECA and ITAR. And
10 that extends to professional firearms or plastic firearms,
11 provided that they are nonautomatic and sub-50-caliber.

12 **To be clear, even if the Court were to grant plaintiffs**
13 **every ounce of relief that they seek in this case, Defense**
14 **Distributed could still mail every American citizen in the**
15 **country the files that are at issue here.** And what that gets
16 at, and what I really want to underscore, is the fundamental
17 disconnect between the claims that plaintiffs are asserting
18 here, and the statutory regime at issue.

19 Again, there are domestic prohibitions on undetectable
20 firearms, on firearm possession. Some of those are federal.
21 Some of those are state. And all remain on the books and
22 capable of being enforced. But plaintiffs are trying to rely
23 on the wrong statutes.

24 So let me start by talking about plaintiffs' theory of
25 injury, which is relevant to their claims of both standing

1 and irreparable harm. Their main argument is that as a
2 result of these files being available, that's going to lead
3 to the proliferation of undetectable guns. Again, that harm,
4 that potential harm is not properly traceable to the
5 regulatory action that's at issue here. If those harms
6 occur, it will be because of separate violations of separate
7 statutory prohibitions.

8 Plaintiffs similarly try to question defendants' national
9 security judgment. But the federal government's judgment is
10 that the risk of small-caliber weapons of this kind does not
11 justify their regulation under the Arms Export Control Act.

12 And that judgment, the federal government's national
13 security judgment, to the extent it's reviewable at all, is
14 entitled to significant deference from the Court.

15 Plaintiffs make the observation that the states are the
16 United States. And I suppose that's true in some sense, of
17 course. But the federal government has principal
18 responsibility for ensuring the national security of the
19 country. And the Arms Export Control Act is part of that.
20 That's the function of that statute.

21 With respect to abrogation of state laws, plaintiffs say
22 that somehow the federal government is interfering with their
23 ability to enforce their state laws. But that's just not so.
24 We are not suggesting that the actions at issue here
25 undermine or preempt state law in any respect. Plaintiffs

1 are just as able to enforce those laws today as they were a
2 year ago.

3 As I've tried to indicate, this fundamental mismatch
4 between what plaintiffs are concerned about and the statute
5 on which they're relying, also really undermines their
6 prudential standing. As a matter of prudential standing,
7 they need to show that their claims are in the zone of
8 interests of the statutory provision upon which they rely.
9 But as the Ninth Circuit has made clear, the Arms Export
10 Control Act is designed to, and I'm quoting, "Protect against
11 the national security threat caused by the unrestricted flow
12 of military information abroad." That's the *United States v.*
13 *Posey* case from the Ninth Circuit.

14 The vast majority of the harms that they're talking about
15 are purely domestic harms that are properly the subject of
16 domestic regulation. But they're not relevant to the foreign
17 affairs concerns of the Arms Export Control Act. And, again,
18 plaintiffs are not able and should not be able to
19 second-guess the executive national security determinations.
20 That is the essential function of the federal government, not
21 state governments.

22 Unless Your Honor has questions on what I've said so far,
23 I'll turn to the likelihood of success on the merits of their
24 APA claims.

25 THE COURT: Go ahead.

1 MR. MYERS: Their primary argument is this 30-day
2 notice provision that arises from 22 U.S.C. Section 2278(f).
3 And what that statute says is that before items are removed
4 from the Munitions List, there needs to be 30 days' notice to
5 Congress.

6 Your Honor can simply look at the United States Munitions
7 List to see that nothing, no items have been removed from the
8 Munitions List. The Munitions List consists of 21
9 categories. And then there are items within those
10 categories. And the items, for example in Category I, are
11 things like nonautomatic and semiautomatic firearms, to
12 caliber 50, or combat shotguns, or silencers, mufflers and
13 flash suppressors. Again, all of those items are still
14 there. The USML has not changed at all as a result of the
15 actions challenged here.

16 What the July 27th notice did was temporarily exclude very
17 specific technical data from the scope of the USML, and
18 essentially meant that the USML would not be applied as to
19 those specific files pertaining to those specific articles.
20 But, again, the items on the USML remain exactly the same.

21 The Heidema declaration, which we have submitted, makes
22 clear that the government has consistently, since at least
23 2011, understood the statute's use of the term "items" in
24 exactly that way. And it further makes clear that Congress
25 has been put on notice that that's how the State Department

1 understands the statute. So that understanding is entitled
2 to some degree of deference from this Court.

3 Indeed, 22 CFR Section 126.2 specifically contemplates
4 temporary suspensions of the regulations as to particular
5 articles. And so what I think plaintiffs are really
6 suggesting is that that regulation is an impermissible
7 interpretation of the statute. And that regulation is
8 likewise entitled to some degree of deference, as a
9 reasonable construction of what the statute means.

10 Plaintiffs further say that defendants have violated the
11 executive order which requires the concurrence of the
12 Secretary of Defense. First of all, that claim only can go
13 forward if there has, in fact, been a change to items or
14 categories of items. So in a certain sense, it's duplicative
15 of the notice to Congress claim that I was just discussing.
16 In addition, Section 6(c) of the executive order is explicit
17 that it does not create rights that are enforceable at law
18 against the United States; which is not the case in the
19 authority upon which plaintiffs have relied to try to say
20 that they can litigate under the executive order.

21 And, finally, the Heidema declaration makes perfectly
22 clear that the Defense Department has been consulted
23 throughout this process, both with respect to the notices of
24 proposed rulemaking, which would exclude all -- which would
25 remove all nonautomatic small-caliber firearms from

1 Category I, and specifically with respect to the subject
2 files that are at issue here.

3 Finally, with respect to plaintiffs' arbitrary and
4 capricious claim, we submit that the notices of proposed
5 rulemaking directly answer that claim. Those notices of
6 proposed rulemaking make clear that the federal government
7 has been involved in a year's long process to determine what
8 kinds of weapons present a critical military or intelligence
9 advantage. And they further reflect the government's
10 judgment that small-caliber, nonautomatic firearms, of a kind
11 that you can buy in essentially any gun store in the United
12 States, do not present such a critical military or
13 intelligence advantage.

14 And so we think that answers their arbitrary and
15 capricious claim.

16 THE COURT: Of course you cannot buy a 3D-printed gun
17 in any firearms store in the United States that's
18 undetectable and untraceable, can you?

19 MR. MYERS: No, Your Honor, if it were undetectable
20 and untraceable, that would be a violation of the
21 Undetectable Firearms Act.

22 THE COURT: So what I keep coming back to, Mr. Myers,
23 is saying we're just doing this gross category of "under
24 50-caliber nonautomatic" because that has no defense or
25 international implications, may apply to every other weapon,

1 but does it apply to a 3D gun that is undetectable and
2 unprintable? And if you look at the government's positions
3 in the case in front of Judge Pitman in Texas, they kept
4 saying: This is different. This is serious. This could be
5 utilized in ways that have a direct impact on our country,
6 because of the proliferation in foreign lands, the fact that
7 people who don't have our best interests in mind can get the
8 guns and then come in with them, or use them to get on
9 airplanes. And we could end up with other kinds of 9/11
10 situations or shoe-bomber situations. That this was a very
11 serious issue, in and apart from the 50-caliber issue.

12 You keep wanting to say: That's just not part of the
13 process. It's not what we were talking about. If it happens
14 to implicate that, we'll deal with it in the way we deal with
15 law enforcement in general. And that doesn't comfort people,
16 because we already see mentally ill people get their hands on
17 guns and have mass shootings. We already see people who are
18 felons get their hands on guns. We see people, who are not
19 entitled to have guns, get their hands on guns. We see
20 children shoot other children with what they think are toy
21 guns. And, my goodness, these plastic guns look even more
22 like toy guns.

23 Where is the recognition, seems to be coming somewhat from
24 the President that: Wait a minute, this is a different
25 matter, and Sarah Sanders, we're glad that the judge put a

1 little stop in this so we can take a better look at it.
2 Where is the better look at it?

3 MR. MYERS: Your Honor, since Your Honor entered the
4 TRO, the government has been further studying and further
5 looking into this issue, as the press secretary I think
6 indicated she was -- or the President was welcoming that
7 opportunity. That further look has concluded. And the
8 government's position on this issue has not changed. And the
9 position of the United States is the position that we've set
10 out in the brief filed with this Court.

11 THE COURT: Okay. So that review internally in the
12 Executive Branch did occur, and the decision was made not to
13 change the position?

14 MR. MYERS: There has been no change in position
15 since we filed our TRO brief and since we filed the PI brief
16 and this morning's hearing.

17 THE COURT: Right. But my question was a little bit
18 different, though. I understand there's been no change. But
19 was that decision not to make a change at the highest levels
20 of the Executive Branch, or we just don't know why it wasn't
21 changed.

22 MR. MYERS: Your Honor, I can't really speak as to
23 who or where in the Executive Branch considerations, you
24 know, have or haven't taken place. I can say that the
25 position I'm articulating today is the vetted, authorized

1 position of the United States Government.

2 THE COURT: Great. Thanks, Mr. Myers. I don't want
3 to stop you. Are you moving on to anything else?

4 MR. MYERS: Your Honor, I think all I would add or
5 all I would just underscore is that the government
6 understands all of the harms and issues that Your Honor has
7 just identified. Again, we understand that undetectable
8 plastic firearms are a serious security threat. The
9 Department of Justice takes the issue seriously, is committed
10 to vigorously enforcing statutes that deal with those topics,
11 we just don't think that the Arms Export Control Act is the
12 relevant statute here.

13 THE COURT: As far as the First Amendment issues go,
14 the federal government has never taken a position that
15 anything that had to do with the Arms Export Control Act
16 implicated First Amendment issues, correct?

17 MR. MYERS: We've denied liability on the First
18 Amendment claim.

19 THE COURT: And even the settlement with Defense
20 Distributed didn't admit to any First Amendment violations?

21 MR. MYERS: It continues to deny liability, right.

22 THE COURT: Okay. And you understand that you and
23 the private defendants do separate on this last issue that
24 you talked about. They want everyone to have an
25 undetectable, untraceable gun, because they -- at least

1 according to Mr. Wilson -- that's the way they will protect
2 themselves from an overbearing, overcontrolling government.
3 And so you're not on the same page on that.

4 MR. MYERS: Again, the Department of Justice is fully
5 committed to enforcing all federal criminal laws that
6 regulate these topics.

7 THE COURT: Thanks, Mr. Myers.

8 MR. MYERS: Thank you, Your Honor.

9 THE COURT: Mr. Flores.

10 MR. FLORES: Thank you, Your Honor. We appreciate
11 the Court's indulgence in letting us brief and argue this
12 case as something of a bystander. We should probably start
13 by recognizing that as the Court correctly saw at the TRO
14 stage, and as we see in footnote 1 of the motion, the
15 plaintiffs don't seek any relief against us in this case.
16 And so we have views we'd like to express, but our role is a
17 unique one.

18 I think it's also critical to acknowledge that what we
19 heard both from counsel for the plaintiffs and the government
20 is that my clients could mail the files at issue to anyone in
21 the country and violate no law. And so really what we're
22 talking about isn't the question of whether, but how much.
23 How much of this activity can occur, due to the use of the
24 Internet? And I think that's a critical thing to realize
25 when we're looking at things like irreparable harm and the

1 evidence that you look at from the plaintiffs.

2 When you decide whether or not to enter an injunction, you
3 can't look at evidence of all of the activity that's going
4 on, you have to look at the marginal increase that would be
5 at issue in this case, because of this particular set of
6 parties.

7 I don't really want to get into the merits of a lot of the
8 discussion here. I actually want to focus on a procedural
9 point. And that is that this isn't an up-or-down question of
10 whether or not to continue the TRO and whether or not the
11 temporary modification should stay in place. I think that in
12 order to sign the order that they've drafted for you, you
13 would need to conduct the analysis, the full analysis of
14 standing, and the merits, and irreparable harm, and the
15 constitutional claims, at least four times.

16 Because, remember, the temporary modification doesn't just
17 apply to 3D guns generally. We're talking about very
18 particular files that are defined consistently throughout the
19 actions. You have four categories. Category I is the
20 published files, which is a defined set of expression.
21 Category II is the ghost gunner files. Category III is the
22 CAD files. And Category IV is the other files.

23 And the procedural point I have to make is that we have
24 very strong arguments that apply to many of these. And the
25 plaintiffs have some okay counterarguments. I acknowledge

1 they are close arguments. But I think that at worst, you're
2 going to have to split the baby here.

3 For example, I think our best argument is that the cat is
4 out of the bag as to the files that are already online.
5 There is an enumerated list of ten files at issue. These
6 belong in the category of the published files and the CAD
7 files that are already available online, no matter what
8 happens in this case.

9 And so we think that takes out their case, both at a
10 standing level and at a traceability level. And they have an
11 answer. And their answer is, yes, but the order also
12 concerns other files that don't exist yet. That may be the
13 case. I have other answers as to other files. But that
14 means you can't issue an injunction as to the matters that
15 are already out in the public domain.

16 And so throughout the analysis, they have to thread the
17 needle all the way through as to all four pieces that we're
18 talking about here.

19 Now, on that last piece, the other files that don't exist
20 yet, we do have a solution to that, and that's a standing
21 problem. This is precisely the kind of speculative harm that
22 isn't justiciable. Because remember, we don't know what
23 files we're talking about. We're just imagining what could
24 be created in the future by, not us, but the people who we
25 send expressive files to. And so that, we think, there

1 doesn't have standing to assert.

2 The standing analysis also needs to be divided, we think.
3 We see three standing arguments. And I think only one of
4 them is debatable. And that one really narrows the case.
5 The first standing argument that we don't think they succeed
6 on is this pure sovereign interest in the states' ability to
7 enact their laws and to have their Executive Branch enforce
8 those laws. They can still do that for the reasons that my
9 friend for the government explained. But that's not at risk
10 here.

11 The second kind of standing argument they have is this
12 quasi-sovereign interest in protecting the safety of the
13 citizens and making sure that there's a peaceable place to
14 live. This is a *parens patriae* argument. The argument that
15 the government can assert the general interest in the safety
16 of its citizens. And as a matter of law, if that ever works,
17 it only works between a state and another state or a state
18 and a private party. It does not run in actions against the
19 government. Because when there are two governments, only one
20 of them can assert the interests of the people, and in this
21 case it's the federal government.

22 So the best argument they have is actually not one that
23 they can deploy against the government here.

24 Then we come to the third standing piece. And I think the
25 most arguable point is about the jails, and the notion that

1 this may make jails more expensive. I don't think that gets
2 them there. I think that's a speculative kind of claim. But
3 if it does, remember when you're balancing the equities,
4 you're not balancing the harm of every citizen in the state.
5 What you're balancing is the increased expense of new weapon
6 detectors versus the balances on the other side. So these
7 are two critical examples of how we can't just paint with a
8 broad brush and say: 3D guns, okay or not okay. We're
9 talking about a very specific set of files.

10 I have two more points that I want to make, Your Honor.
11 One of them is a little bit in the weeds and another is sort
12 of a separate issue. The first point is in the weeds of the
13 merits of the case, about whether a removal occurred. You
14 heard an argument from the government that said the reason
15 there haven't been procedural violations is because an item
16 isn't at issue here. We have a slightly different argument.
17 Even if you think that an item is at issue, removal didn't
18 occur. Because there is a difference between removing things
19 from the list and supplying an exemption.

20 And I'll start with an analogy and then I'll take you to
21 the text. The analogy is: I am arguing before the Court
22 today. I haven't been admitted to the bar. There are rules
23 that say I have to take and be a member of the Washington
24 bar, and I'm not. And yet I'm here. And the fact that I'm
25 here, the Court admitted me pro hoc, it doesn't mean the

1 Court removed the requirement of bar admission from the usual
2 way of getting into court. There's a separate system.

3 And you can see this in the statute. It's at 2278(g)(6).
4 And that's where the statute says that the President can
5 require a license or other form of authorization. So you see
6 this throughout the regulatory provisions as we go pretty
7 deep into it in the briefs, is that there isn't just one way
8 to turn the switch on and off. The President has
9 flexibility. This isn't removing anything. We're talking
10 about an exemption.

11 The last issue I want to talk about today is the matter
12 that we filed with the Court on Sunday night. And it's a
13 question of subject matter jurisdiction. We are in the case
14 because the plaintiffs say we're a necessary party. And I'm
15 not sure that that is so. If the case continues, we'll have
16 to litigate that. We'll have to litigate a lot of things.

17 But according to the complaint in paragraph 24, the reason
18 we're in the case is because the relief that they ask for may
19 affect the settlement agreement. And recall that the
20 settlement agreement is a contract that involves the United
21 States as a party and my client, Defense Distributed. So
22 they say we're here because something in this case is going
23 to affect the contract.

24 If that's so, we may have a Tucker Act problem. And the
25 Tucker Act problem is that suits on contract belong only in

1 the court of federal claims. And even when they can be
2 brought in district court, no injunctive relief is available.

3 Now, I'm not sure exactly what the plaintiffs mean when
4 they say this case could affect our rights under the
5 settlement agreement, so maybe we can hear that in rebuttal.
6 But if part of this case entails changing the obligations of
7 the settlement agreement, the Court has to take a hard look.
8 We've given the Court, I think, a starting point for that
9 analysis textually, so it would be a question of 1491 on
10 whether the case is founded upon the contract. And maybe
11 it's not. In which case, we would acknowledge if it's not
12 founded on that, we're out. But it's a matter of subject
13 matter jurisdiction. And I wanted to bring it to the Court's
14 attention, because of our somewhat attenuated role in the
15 case.

16 Unless the Court has further questions, we'll yield the
17 remainder of our time.

18 THE COURT: Thanks very much, Mr. Flores. It's nice
19 to have you here, even if it's under an exemption.

20 All right. Mr. Rupert. I don't think I'll need to hear
21 from Mr. Sprung.

22 MR. RUPERT: Thank you. Your Honor, we've had a
23 discussion of statutory schemes and going through all the
24 elements. But I do want to highlight what's at issue here.
25 For instance, we have Moms Demand Action in the courtroom

1 here. The public is very concerned about these 3D weapons
2 and the potential harm that they could cause. So I want to
3 focus on the irreparable harm. And I will certainly address
4 the points that were made. But I think that's what drove our
5 action and is one of the defining features of this case, is
6 all of the undisputed evidence in the record demonstrating
7 irreparable harm, both from the states as well as the federal
8 government, before it made this change.

9 We heard a number of things from the federal government
10 which I think we have addressed many of them on my initial
11 presentation, but I'll just highlight a few. We heard again
12 this idea that items, removal of items is, in fact, a
13 category. And, again, I think we would point to largely what
14 we did before. If you look at, particularly the executive
15 order that refers to items or categories of items, that
16 interpretation just doesn't find support. I would also
17 highlight the declarations from the congressmen, who
18 certainly believe that they were required to give notice for
19 this.

20 There was also this idea that there was not a removal of
21 items. Well, I submit that when you exclude items, that is,
22 in fact, a removal. And I don't think that bears a lot of
23 discussion, unless Your Honor has questions about that.

24 I do want to highlight the arbitrary and capricious claim.
25 We had some discussion, I thought Your Honor had some very

1 good questions. Because it's the exact points that we're
2 making here that if they're going to justify this, or attempt
3 to justify this decision about 3D guns, they can't do it by
4 referring to a rule that's not yet final. And then even in
5 that rule, as Your Honor identified, it seems to have been a
6 broad category. And we don't know what the reasoning was, if
7 it was administrative oversight, or if it was an intentional
8 decision.

9 But either way, when you look at the justifications in the
10 Heidema declaration for making that rulemaking proposed
11 change, again not final, it's that the items are readily
12 available. And it's obvious that 3D guns are not readily
13 available. And as the government then notes that, in fact,
14 it would be illegal to possess it. So we have a disconnect
15 there. And we believe that demonstrates, very vividly, the
16 arbitrary and capricious nature of the government's action
17 here.

18 Now, we have the private defendants kind of pointing out
19 there were a number of files at issue here and wanting a
20 separate analysis for those. I would just point to Judge
21 Pitman's analysis, that's the one that we have followed. And
22 I believe Judge Pitman readily addressed this issue there.
23 So I think the Court can look to Judge Pitman for that.

24 And then there's also this, I'll call it the
25 cat-out-of-the-box argument, that the idea that, well, some

1 of these files are out there on the Web, so that means that
2 whatever we're here doing today is for no good. I
3 fundamentally disagree with that. I mean, it's one thing to
4 have them out there on the far reaches of the Internet, but
5 it is a far different thing to have them readily available
6 for anyone to find. So I do think that this temporary
7 restraining order that Your Honor has issued, as well as
8 potentially a preliminary injunction, has a real effect in
9 preventing the harm that we've identified. And, again, we
10 have declarations supporting our position. And we have
11 speculation on the other side.

12 We also have this question that, well, this idea that, you
13 know, one of the things we focused on is we that have certain
14 files right now, but then what the government has done with
15 the temporary modification is opened up all kinds of 3D gun
16 files that will come. And they say, well, it's too
17 speculative.

18 Again, let's look at the record. We have Professor Patel
19 talking about the advances that are going to come in 3D
20 printing. So it's not speculative at all.

21 Then, finally, there was a question about standing. But
22 the standing analysis or argument overlooks the case law, the
23 special solicitude case law, in *Massachusetts v. EPA* and
24 *Texas v. United States of America*, which recognized that. I
25 would point Your Honor to that, which is in our briefs as

1 well. And even the private defendants recognize that the
2 proprietary standard is a much closer call, we would say it's
3 an easy call.

4 But if our metal detectors, like the one downstairs, are
5 no longer effective, we're going to have to get something
6 new. And that doesn't come for free. Or the other
7 alternative is start going back to hand searches, which are
8 going to present some issues of their own, about trying to
9 get everybody through, and all kinds of other situations that
10 are going to arise; if you have to search everyone by hand
11 and pat them down, it's going to take a lot more manpower.
12 So we have proprietary standing right there.

13 Then, finally, I'll address this subject matter issue
14 that's been raised in this last-minute filing with just this
15 case. This is not a contract case. We said that last time
16 we were here. This is an APA case. The reason we included
17 them in the case is that when we balanced the equities, they
18 may have an interest in that. And so we wanted them to be
19 heard. And they are here making their arguments.

20 But at the end of the day, this is not a contract case at
21 all. We are attacking the government's decision to allow
22 these 3D guns to be readily available, and the administrative
23 process there. We're not attacking the settlement agreement
24 itself.

25 THE COURT: There may be contractual issues between

1 Defense Distributed and the federal government, based on the
2 settlement agreement. But it's not in front of me and it's
3 not part of this lawsuit is what you're saying?

4 MR. RUPERT: That's correct, Your Honor.

5 THE COURT: I agree with that. But I'm glad to have
6 Mr. Flores and his client here to express a point of view
7 that obviously the federal government isn't willing to go
8 that far. So it's very useful to have him here. But I agree
9 with you, I'm not touching any contract issue in the case.

10 You know, it's a little bit frustrating to be sitting in
11 this chair as a United States District Court Judge and seeing
12 this is an issue that should be solved by the political
13 branches of government. Like I say, when the issue came
14 before me on July 30th and I had to make a decision on
15 July 31st, on probably the most significant case that I've
16 handled as a United States District Court Judge, and having
17 the shortest amount of time possible to rule on the case,
18 that was one thing.

19 But where are the political branches to step up and deal
20 with an important issue like this? And it's very
21 frustrating, because there are justifiable criticisms: Who
22 is this federal judge out in Seattle that's going to make
23 such an important decision? And I'm not going to make an
24 important decision about these issues that you've raised.
25 It's not for me to do. But it is for me to determine: Did

1 the federal government follow their rules in making the
2 modification and sending the letter? And I will deal with
3 those in that technical arena.

4 But a solution to the greater problem is so much better
5 suited to the other two branches of government. And I really
6 hope and wish that the Executive Branch and Congress would
7 face up to this and say, it's a tough issue, but that's why
8 you got into public service to begin with.

9 But thanks very much. Did you have anything else,
10 Mr. Rupert?

11 MR. RUPERT: I do not, Your Honor.

12 THE COURT: I'm going to take the matter under
13 advisement. There is some excellent briefing and issues that
14 I want to take a closer look at. I will definitely get a
15 written decision out by Monday, August 27th. So you'll have
16 it for sure before the expiration of the TRO on the 28th.

17 Okay. Thanks very much, counsel. We are adjourned.

18 (Adjourned.)

19 C E R T I F I C A T E

20

21 I certify that the foregoing is a correct transcript from
22 the record of proceedings in the above-entitled matter.

23

24 /s/ Debbie Zurn

25 DEBBIE ZURN
COURT REPORTER